

THE BOARD OF MARITIME PILOTS

STATE OF OREGON

BP 18-01

IN THE MATTER OF AUTOMATIC COST)
OF LIVING ADJUSTMENTS TO RATES)
OF PILOTAGE FOR THE COLUMBIA)
RIVER BAR)
(CASE NO: 2018-01))
) **FINAL ORDER**
IN THE MATTER OF AUTOMATIC COST)
OF LIVING ADJUSTMENTS TO RATES)
OF PILOTAGE FOR THE COLUMBIA)
AND WILLAMETTE RIVERS)
(CASE NO: 2018-02))
)
IN THE MATTER OF AUTOMATIC COST)
OF LIVING ADJUSTMENTS TO RATES)
OF PILOTAGE FOR COOS BAY)
& YAQUINA BAY)
(CASE NO: 2018-03))

DISPOSITION

SINGLE ISSUE: AUTOMATIC ADJUSTMENT INDEX

HISTORY OF THE CASE

On September 20, 2018, the Board issued a Notice of Intent (Notice) in each of the above-captioned cases to promulgate single-issue orders, altering the index used for the Board's annual automatic cost of living adjustment to the established rates.¹ The Notice set forth the Board's intention to adopt the Western region all urban consumers Consumer Price Index in place of the Portland-Salem all urban consumers Consumer Price Index for purposes of calculating the COLA as set forth in each of the respective rate² orders, and its intention to pro-rate the payments missed from September 1, 2018 to the date any final order was issued, over the

¹ The Board did not propose to adjust the rates themselves, only to change the index upon which the annual automatic adjustment to the established rates is based.

² See *fn 1*, above. The current rate orders, including the rates established therein, remain in effect except for the single issue of the COLA index, which ceased to be an enforceable element of the orders when that index was deleted.

remainder of the automatic adjustment year. The Board noticed the Coos Bay Pilots Association, the Columbia River Pilots and the Columbia River Bar Pilots the Oregon International Port of Coos Bay, the Columbia River Steamship Operators Association (CRSOA), the Ports of Portland, Vancouver, Astoria, Longview and Kalama as parties interested in the proceedings.

In each respective Notice of Intent, the Board explained its reasoning as follows:

Because the Portland-Vancouver/ Portland Salem index was deleted in January of 2018, a comparison between it and the current Western Region index is not possible. The last change reported for the Portland-Vancouver/Portland-Salem all urban consumers Consumer Price Index was > .1% than the current change to the Western Region all urban consumers Consumer Price Index, which difference will be reflected in the September 2018 automatic adjustment.

The Board further concluded that

the reduction to the first automatic adjustment from this proceeding will be minimized slightly for the first 8 months it is in effect, based on the pro-rated amount to be recouped from the period after September 1, 2018 to the effective date of a final order date in this matter.

No hearing was requested.

On October 18, 2018, CRSOA filed a combined response to the OBMP petitions for the implementation of the new COLA. By letter of October 22, 2018, OBMP sought clarification from CRSOA with respect to its response, to which CRSOA replied on October 24, 2018.

On November 13, 2018, Administrative Law Judge Allan Arlow issued a Proposed Order recommending the Board amend Final Orders No. 10-01, issued May 19, 2010, 10-02, issued May 19, 2010 and Final Order 14-01 issued April 8, 2014, and 08-1, 09-02 and the 2009 Stipulation, each of which is currently in effect, to reflect the utilization of the Western Region all urban consumers Consumer Price Index in place of the Portland-Salem all urban consumers Consumer Price Index in calculating the cost of living index adjustment (COLA) applicable to the rates in each respective pilotage grounds. He also recommended that the calculation for the cost of living index applied to each of the respective rate orders, consistent with the Board's Notices, be the following:

3.55% CPI effective September 1, 2018

Assuming the new CPI index can go into effect December 1, 2018 (10 months left in year):

$$3.55\%/10 = .355$$

$$.355 \times 12 = 4.26\% \text{ prorated adjustment}$$

No exceptions to the Proposed Order were filed.

The Board now issues its final order accepting ALJ Arlow's recommendation to use the Western Region all urban consumers Consumer Price Index in place of the Portland-Salem all urban consumers Consumer Price Index in calculating the cost of living index adjustment (COLA) applicable to the rates in each respective pilotage grounds, and to pro-rate the automatic adjustment amounts accumulated to date throughout the remainder of the automatic adjustment year. However, the Board issues this new, single-issue order, to change the COLA index to be used for the annual cost of living adjustment to the established rates, to ensure the current rate orders are enforceable, not to amend its current rate orders.³ Moreover, the Board has adjusted ALJ Arlow's proposed calculation for pro-ration of the COLA amounts not yet collected this COLA year, to reflect the time that has passed since the COLA year began (September 1, 2018). When the Board has otherwise made anything but minor changes to the Proposed Order's facts or reasoning or rearranged the sequence of the Proposed Order's elements, those changes have been identified and explained.

The Board hereby issues the following Final Order:

FACTS

1. The current rates of pilotage for the Columbia River Pilots (COLRIP) were established by Final Order No. 10-01, issued May 19, 2010.
2. The current rates of pilotage for the Columbia River Bar Pilots (CRBP) were established by Final Order No. 10-02, issued May 19, 2010 and Final Order 14-01 issued April 8, 2014.
3. The current rates of pilotage for the Coos Bay Pilots were established by Final Orders 08-1, 09-02 and the 2009 Stipulation.
4. Pursuant to the aforementioned orders, most⁴ items in their respective tariffs shall annually be automatically adjusted via a COLA based on changes to the United States Bureau of Labor Statistics (BLS) Portland-Vancouver OR-WA/Portland-Salem Region all urban consumers Consumer Price Index (also named the Portland-Salem all urban consumers Consumer Price Index).
5. In January, 2018, the BLS deleted this index.

DISCUSSION

ORS 776.115 (5) provides the Board with the authority to fix just and reasonable rates for pilotage services. ORS 776.115(8) states that the Board may

³ The Board has no statutory authority to modify final rate orders.

⁴ Not all items are annually automatically adjusted. For example, the Continuing Professional Development surcharge is not.

Establish rates pursuant to subsection (5) of this section, for a period of not less than two years, that continue in effect until a subsequent hearing process. *Rates may include automatic adjustment provisions to reflect changing economic conditions.* (Emphasis added)

The Board has concluded that a single-issue order addressing the need to adopt a new CPI index is necessary and that further adjustments are required to address the gap between the time that the Portland-Salem all urban consumers Consumer Price Index ceased and the effective date of the Board's actions. The Board's notices reflected its review and analyses of regional indices and its final selection based on the close parallels between the Portland-Vancouver OR-WA/Portland-Salem all urban consumers Consumer Price Index and the Western Region all urban consumers Consumer Price Index.

The Board therefore proposed that the increase go into effect as of September 1, 2018. The board further proposed that, assuming the Western Region all urban consumers Consumer Price Index is adopted, a pro-ration of missed automatic adjustment payments would be applied to the automatic adjustment year's remaining months.⁵

No party opposes the principle of applying a COLA to the rates established by the orders currently in effect or—most central to the Board's consideration—the substitution of the Western Region all urban consumers Consumer Price Index in the formulae for calculating the COLAs as set forth in prior orders currently in effect. Neither was there any opposition to the proposed formula to account for the period of time between the ending of the Portland-Salem index and the date of the Board's intended action.⁶ However, nine rather 10 months of the automatic adjustment year remain, which calls for the following minor adjustment to the proposed calculation.

⁵ The Board did not propose a specific formula in its Notices. The formula was proposed by ALJ Arlow in his Proposed Order.

⁶ CRSOA did not oppose the proposed actions in the Board's Notices, nor did it request a hearing on this matter, but clarified in its supplement to its response that it believes making these changes through a Board-initiated proceeding is unnecessary, contrary to prior precedent, contrary to the Board's statutes, and contrary to its current final orders. CRSOA then called the BLS deletion of the prior index a "re-labeling" of that index, and conflated the Board's authority to interpret its own rules with a suggestion that the Board could somehow "interpret" the language in its final orders in a way to change the words therein. CRSOA also suggested that the Board should enter a settlement agreement to make its proposed changes to the COLA index, rather than issuing a Board-initiated final order to do so. We find none of these assertions to have merit. This proceeding was clearly necessary; the COLA index referenced in all of the Board's current rate orders no longer exists, making the automatic adjustment unenforceable without this action by the Board. That the Board has not initiated a proceeding of this type before does not make it unlawful or improper to do so. Contrary to CRSOA's assertion, it is the Board's specific statutory responsibility to fix rates, set automatic adjustments to those rates, and ensure that its orders are enforceable. Also contrary to CRSOA's assertions, the BLS did not relabel the prior index; the BLS deleted it entirely. In addition, without engaging in a lengthy explanation of the limits of an agency's authority to interpret its own rules, no authority exists for an agency to rewrite the terms of a final order that has already been issued by claiming those terms mean something new. Moreover, any new settlement agreement would have had to have been entered as part of a new final order, mirroring the terms in this one. As no party objected to the change in the COLA index proposed or the pro-ration of COLA payments missed, this single-issue order was a more efficient way of achieving those ends than a protracted and unnecessary settlement process. Finally, this order does not violate or invalidate the current rate orders. On the contrary, because it does not establish new rates or even establish a new automatic adjustment to those rates, but only provides an index that enables the existing automatic adjustments to be applied to the existing rates, it is the mechanism that makes the current rate orders enforceable after deletion of the prior index.

3.55% CPI effective September 1, 2018

Assuming the new CPI index can go into effect December 1, 2018 (9⁷ months left in year):

$$3.55\%/9 = .394$$

$$.394 \times 12 = 4.73\% \text{ prorated adjustment}$$

Resolution

Given the impossibility of utilizing the index originally referenced in the current rate orders, and the resulting unenforceability of the automatic adjustment to the established rates in the current orders, the substitution of the Western Region all urban consumers Consumer Price Index is the most just and reasonable means to fulfill the intent of the Board and the parties associated with the current rate orders. This finding is supported by the unanimity of the parties' views with respect to the index's application. We further find that the proposed methodology for adjusting for the lack on an index during a portion of the 2018 rate period, when modified for the additional time that has elapsed since September 1, 2018, is an appropriate means to fulfill the intention of the Board's rate orders. The adoption of these changes to the index for the COLA in each order currently in effect will result in rates which are just and reasonable and will not prejudice the rights of any party.

ORDER

Based on the facts, law, and analysis above, IT IS ORDERED as follows as of midnight, November 30, 2018:

1. Effective September 1, 2018, the Western Region all urban consumers Consumer Price Index is the index on which the annual automatic cost of living adjustment to the established rates shall be based;
2. The pro-rated percentage to be applied for the cost of living adjustment to each of the respective rate orders for the remainder of the September 1, 2018 – August 31, 2019 automatic adjustment year is 4.73%.
3. All other aspects of the Board's current rate orders, including but not limited to all other details of the Automatic Tariff Adjustment Mechanism and the date when a new petition may be filed with the Board to make changes to rates for pilotage on any of the pilotage grounds regulated by the Board, remain unaffected by this Final Order.

⁷ There are only 9 months left in the automatic adjustment year, which ends August 31, 2019.

Dated this 30th day of November, 2018, at Portland, Oregon.



Gary Piercy, Chair
Oregon Board of Maritime Pilots

APPEAL RIGHTS

You are entitled to judicial review of this order in accordance with ORS Chapter 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon within 60 days from the date of service of this order.